

1           13. While camping, Plaintiffs regularly light wood campfires in the evenings. Up  
2 until April 21, 2006, Mr. Shalaby typically ignited the family's campfires by using his  
3 BernzOmatic MAPP Gas torch to ignite the firewood. Mr. Shalaby stored the torch in a wooden  
4 box, along with the auxiliary MAPP Gas canisters, which Plaintiffs kept inside of their  
5 recreational vehicle.

6           14. The MAPP Gas torch kit contained a written representation that, among other  
7 things, one of the intended and/or acceptable uses of the torch was for "lighting grills." By  
8 making this representation, BernzOmatic intended for consumers to use its MAPP Gas torches to  
9 start cooking and/or recreational campfires, and knew or should have known that some  
10 consumers would use its torches in the manner that Mr. Shalaby used his torch at the time of the  
11 incident which is the subject of this lawsuit, as set forth in more detail herein below.

13           15. Neither the torch nor the MAPP Gas cylinder contained a warning against using  
14 the torch to ignite a wood campfire.

15           16. Defendants and each of them at all times herein mentioned knew and intended  
16 that the BernzOmatic Brand MAPP Gas torches that they designed, manufactured, marketed and  
17 sold would be purchased and used by consumers without the requisite knowledge of what  
18 constitutes material defects in the product, and thus without inspection for defects therein or in  
19 any of its component parts.

21           17. The MAPP Gas torch and/or cylinder at issue in this case was, at the time Mr.  
22 Shalaby purchased it, defective and unsafe for its intended purposes in that the design,  
23 manufacture and/or workmanship of the torch or its component parts were such that, without any  
24 misuse of or abuse to the product on the part of the user, the contents of the cylinder allowed to  
25 discharge instantaneously and become ignited upon activation of the torch ignition switch.

27           18. Between the date on which he purchased the MAPP Gas torch kit and April 21,  
28 2006, Mr. Shalaby used the torch to ignite campfires on many occasions.

## A. The Incident

2       19. During the week of April 17, 2006, Plaintiffs were vacationing at the "Campland  
3 on the Bay" recreational vehicle resort, located at 2211 Pacific Beach Drive in San Diego,  
4 California.

5       20. On or about the evening of April 21, 2006, Mr. Shalaby was seriously injured  
6 when he activated the trigger switch on his BernzOmatic MAPP Gas torch in order to light a  
7 wood campfire in a designated campfire pit, located within the campsite at the Campland  
8 complex where Plaintiffs were staying. Mr. Shalaby activated the trigger switch on the torch  
9 when the MAPP Gas cylinder suddenly, instantaneously, and without warning, exploded and/or  
10 discharged its contents, which caught fire. The heated MAPP Gas and fire enveloped Mr.  
11 Shalaby, and caused severe burns to his face, limbs, and extremities.

## **B. Ms. Dunn-Ruiz Witnessed the Incident**

13       21. Ms. Dunn-Ruiz was less than ten feet away from Mr. Shalaby when the  
14 BernzOmatic cylinder exploded and/or instantaneously discharged its contents and enveloped  
15 Mr. Shalaby in heated MAPP Gas and fire. While she had her back turned to her husband at the  
16 moment the explosion and/or gas discharge occurred, Ms. Dunn-Ruiz heard the noise from the  
17 explosion and/or gas discharged, and turned around within seconds to see her husband enveloped  
18 in flames.

### C. Plaintiffs' Damages

20       22. Mr. Shalaby was confined to a hospital for approximately three weeks after the  
21       incident of April 21, 2006 involving the BernzOmatic torch and MAPP Gas cylinder, receiving  
22       medical treatment for his injuries, including but not limited to painful skin grafts and surgeries,  
23       as well as treatments for infections and other medical complications that were proximately  
24       caused by the incident. Mr. Shalaby was bedridden for several weeks thereafter. During his  
25       time in the hospital, Mr. Shalaby incurred in excess of \$300,000 in medical expenses, and he  
26       continues to incur medical substantial expenses in connection with ongoing medical treatment  
27       for his injuries.

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1       23. At all times mentioned herein, Mr. Shalaby was and remains a self-employed  
2 attorney at law with an active litigation practice. During the time he was confined to the  
3 hospital, Mr. Shalaby was unable to work and, as a result, lost a substantial amount of income.  
4 Since being discharged from the hospital, Mr. Shalaby's ability to resume his law practice has  
5 been limited due to the physical and emotional injuries he sustained as a result of the April 21,  
6 2006 incident involving the BernzOmatic torch and MAPP Gas cylinder. Mr. Shalaby was  
7 recently able to resume practicing law on a limited basis, but he continues to lose a substantial  
8 amount of business and income due to his limited ability to practice law on a full time basis. Mr.  
9 Shalaby will continue to lose income as a result of the injuries he sustained from the  
10 BernzOmatic MAPP Gas torch for an indefinite period of time.

11       24. Mr. Shalaby has suffered mental anguish and emotional injuries as a result of the  
12 April 21, 2006 incident with the BernzOmatic torch and MAPP Gas cylinder, including but not  
13 limited to Post Traumatic Stress Disorder, for which he has sought treatment. Mr. Shalaby has  
14 incurred, and continues to incur, out-of-pocket expenses for the treatment of his emotional  
15 injuries.

16        25. Ms. Dunn-Ruiz has suffered mental anguish and emotional injuries as a result of  
17        witnessing her husband burn as a result of the April 21, 2006 incident with the BernzOmatic  
18        torch and MAPP Gas cylinder while standing in close proximity to her husband.

**FIRST CAUSE OF ACTION -- STRICT PRODUCTS LIABILITY**  
*(By Mr. Shalaby Against Irwin Industrial Tools and Home Depot)*

22 26. Plaintiffs incorporate by this reference the allegations, and each of them,  
23 contained in paragraphs 1 through 25 above, as though fully set forth herein.

24       27. At all times mentioned in this complaint, the BernzOmatic Brand MAPP Gas  
25 torch and/or cylinder that caused Mr. Shalaby's injuries and/or its component parts, were  
26 defective as to design, manufacture, and warnings, which caused the torch, cylinder and/or their  
27

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1 component parts to be in a dangerous and defective condition and prone to failure, which made  
2 them unsafe for their intended use.

3 28. Plaintiffs are informed and believe that the torch and/or cylinder contained one or  
4 more manufacturing defects when they left the possession of Irwin Industrial Tools, Home Depot  
5 and/or DOES 2 through 100 (collectively "Defendants") in that the torch and/or cylinder differed  
6 from the intended design and specifications, and/or from other typical units of the same product  
7 line.

8 29. Plaintiffs are further informed and believe that the design of the BernzOmatic  
9 torch and/or MAPP Gas cylinder that caused Mr. Shalaby's injuries was defective because the  
10 torch and/or cylinder did not perform as safely as an ordinary consumer would have expected  
11 them to perform when used in the manner that Mr. Shalaby did at the time of the April 21, 2006  
12 incident which is the subject of this case.

14 30. Defendants, and each of them, designed, manufactured, distributed, marketed  
15 and/or sold the torch and cylinder, and the torch and/or cylinder contained one or more  
16 manufacturing and/or design defects when they left Defendants' possession.

18 31. As a direct and proximate result of the defective and dangerous condition of torch,  
19 cylinder and/or their component parts as described above, Mr. Shalaby sustained the following  
20 serious injuries and damages from using the torch in an intended manner:

21 a. Deep burns over 22% of his body surface, including his face, hands, arms  
22 and legs, requiring surgical repair, skin grafts and continuing medical treatment;

24 b. physical pain and discomfort;

25 c. immobility;

26 d. disfigurement;

27 e. lost wages; and

1 f. emotional trauma and mental anguish, including but not limited to Post  
2 Traumatic Stress Disorder.

3 **SECOND CAUSE OF ACTION -- STRICT LIABILITY FOR FAILURE TO WARN**  
4 (By Mr. Shalaby Against Irwin Industrial Tools and Home Depot)

5 32. Plaintiffs incorporate by this reference the allegations, and each of them,  
6 contained in paragraphs 1 through 31 above, as though fully set forth herein.

7 33. The BernzOmatic torch and MAPP Gas cylinder that caused Mr. Shalaby's  
8 injuries lacked sufficient instructions or warnings of the potential risk and danger that the  
9 cylinder might suddenly and instantaneously discharge its contents and catch fire when used in  
10 an intended and foreseeable manner.

12 34. This danger and risk were known or should have been known to Defendants at the  
13 time the torch and MAPP Gas cylinder were designed, manufactured, distributed, marketed and  
14 sold.

15 35. These risks presented a substantial danger to purchasers and users of the torch that  
16 ordinary consumers would not have recognized or expected, particularly without an adequate  
17 warning.

19 36. Mr. Shalaby was injured when he used the torch in a manner that was intended  
20 and foreseeable to Defendants.

21 37. The lack of sufficient instructions or warnings was a substantial factor in causing  
22 Mr. Shalaby's injuries.

24 **THIRD CAUSE OF ACTION – NEGLIGENCE**  
25 (By Mr. Shalaby Against Irwin Industrial Tools)

26 38. Plaintiffs incorporate by this reference the allegations, and each of them,  
27 contained in paragraphs 1 through 37 above, as though fully set forth herein.

1           39. Irwin Industrial Tools, whose BernzOmatic division designed, manufactured,  
2 distributed, marketed and/or sold the BernzOmatic Brand torch and MAPP Gas cylinder that  
3 caused Mr. Shalaby's injuries.

4           40. Irwin Industrial Tools was negligent in designing and/or manufacturing the torch  
5 and MAPP Gas cylinder in that they failed to use the amount of care in designing and/or  
6 manufacturing the torch and cylinder that a reasonably careful designer and manufacturer would  
7 use in similar circumstances to avoid exposing others to a foreseeable risk of harm.

8           41. Mr. Shalaby was harmed as a proximate result of Irwin Industrial Tools'  
9 negligence when the BernzOmatic Brand MAPP Gas cylinder exploded and instantaneously  
10 discharged its contents upon Mr. Shalaby's activation of the torch trigger switch.

12           42. The negligence of Industrial Tools' was a substantial factor in causing Mr.  
13 Shalaby's injuries.

14           **FOURTH CAUSE OF ACTION – NEGLIGENT FAILURE TO WARN**  
15           *(By Mr. Shalaby Against Irwin Industrial Tools and Home Depot)*

16           43. Plaintiffs incorporate by this reference the allegations, and each of them,  
17 contained in paragraphs 1 through 42 above, as though fully set forth herein.

18           44. Defendants, and each of them, were negligent by not using reasonable care to  
19 adequately warn or instruct consumer's about the dangerous condition(s) in the BernzOmatic  
20 Brand MAPP Gas torch's and/or cylinder that caused Mr. Shalaby's injuries, or about  
21 circumstances that are likely to make the consumer's use of the torch dangerous.

23           45. Defendants, and each of them, knew or reasonably should have known that the  
24 torch presented an unreasonable danger of exploding, or was likely to explode, when used in a  
25 reasonably foreseeable manner.

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1           46. Defendants knew or reasonably should have known that users of the torch would  
2 not realize this danger, yet failed to adequately warn of the danger or instruct users on the safe  
3 use of the torch to prevent the type of injuries that Mr. Shalaby has sustained.

4           47. A reasonable designer, manufacturer, marketer, distributor and seller would have  
5 warned of this danger, or instructed users on the safe use of the torch, to prevent that type of  
6 injuries that Mr. Shalaby has sustained.

7           **FIFTH CAUSE OF ACTION – BREACH OF IMPLIED WARRANTY OF  
8 MERCHANTABILITY**

9           (By Mr. Shalaby Against Irwin Industrial Tools and Home Depot)

10          48. Plaintiffs incorporate by this reference the allegations, and each of them,  
11 contained in paragraphs 1 through 47 above, as though fully set forth herein.

12          49. Mr. Shalaby was proximately harmed by the BernzOmatic Brand torch and  
13 MAPP Gas cylinder used in the April 21, 2006 incident because the torch and cylinder did not  
14 have the qualities, reliability and safety that a reasonable consumer would expect.

15          50. At the time he purchased the torch, Defendants were in the business of selling  
16 BernzOmatic Brand torches and MAPP Gas cylinders.

17          51. The BernzOmatic torch and MAPP Gas cylinder that caused Mr. Shalaby's  
18 injuries were not of the same quality as those generally acceptable in the industry, and were not  
19 fit for the ordinary purposes for which such products are used.

20          52. The failure of the torch to have the expected quality that it should have had was a  
21 substantial factor in causing Mr. Shalaby's injuries.

22           **SIXTH CAUSE OF ACTION –  
23 NEGLIGENT INFILCTION OF EMOTIONAL DISTRESS**  
24           (By Plaintiffs Against All Defendants)

25          53. Plaintiffs incorporate by this reference the allegations, and each of them,  
26 contained in paragraphs 1 through 52 above, as though fully set forth herein.

1           54. Defendants, and each of them, were negligent in designing, manufacturing,  
2 distributing and selling the defective BernzOmatic Brand torch and MAPP Gas cylinder that  
3 caused Mr. Shalaby's injuries.

4           55. Ms. Dunn-Ruiz was present at the scene of the April 21, 2006 incident involving  
5 the explosion and/or instantaneous discharge of the contents of the MAPP Gas cylinder in Mr.  
6 Shalaby's hands, when it occurred, and was aware at the time that her husband was sustaining  
7 severe and life threatening injuries.

8           56. Both Mr. Shalaby and Ms. Dunn-Ruiz suffered serious emotional distress as a  
9 result of experiencing and observing the April 21, 2006 incident, respectively, including severe  
10 mental suffering, grief, anguish, anxiety, depression, worry, shock, and in the case of Mr.  
11 Shalaby, Post Traumatic Stress Disorder.

12           57. The negligence of Defendants in designing, manufacturing, distributing,  
13 marketing and selling the defective torch and/or MAPP Gas cylinder was a substantial factor in  
14 causing Plaintiffs' serious emotional distress.

15           Wherefore, Plaintiffs DEMAND A JURY TRIAL, and pray that a judgment be entered  
16 against Defendants, and each of them, as follows:

- 19           1. For general damages, including but not limited to damages for emotional distress,  
20 pain and suffering, according to proof;
- 21           2. For special damages, including but not limited to out of pocket medical expenses  
22 and incidental expenses related to Mr. Shalaby's injuries, and lost income, according to proof;
- 23           3. For exemplary damages;
- 24           4. For prejudgment interest according to law;
- 25           5. For costs of suit incurred in this action; and

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2. For any other and further relief that the court deems just and proper.

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4 Dated: June 11, 2007

ALBORG, VEILUVA & EPSTEIN LLP

5

/s/

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By: MARK D. EPSTEIN  
7 Attorneys for Plaintiffs

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**EXHIBIT E**

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4  
 5 Attorneys for Defendant and Third Party Plaintiff, BERNZOMATIC, an  
 6 Unincorporated Division of Irwin Industrial Tool Company, and  
 7 Defendant, THE HOME DEPOT, INC.

8  
 9 UNITED STATES DISTRICT COURT  
 10 NORTHERN DISTRICT OF CALIFORNIA

11 ANDREW SHALABY, an individual, ) CASE NO. C 06 7026 EDL  
 12 and SONIA DUNN-RUIZ, an ) Magistrate Judge Elizabeth D.  
 13 individual, ) LaPorte  
 14 Plaintiffs, ) THIRD PARTY COMPLAINT ON  
 15 v. ) BEHALF OF BERNZOMATIC, AN  
 16 IRWIN INDUSTRIAL TOOL COMPANY, ) UNINCORPORATED DIVISION OF  
 17 THE HOME DEPOT, INC., and DOES ) IRWIN INDUSTRIAL TOOL COMPANY  
 18 2 through 100, inclusive,  
 19 Defendants.

20 BERNZOMATIC,  
 21 Cross-Complainant,  
 22 v.  
 23 WESTERN INDUSTRIES, INC., )  
 24 WORTHINGTON INDUSTRIES, AND )  
 25 ROES 2 through 100, inclusive,  
 26 Cross-Defendants.

27 For their Third Party Complaint against the Third Party  
 28 Defendants, Defendant/Third Party Plaintiff, Bernzomatic, an

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1 Unincorporated Division of Irwin Industrial Tool Company  
2 (hereinafter Bernzomatic), states as follows:

3 PARTIES

4 1. Defendant/Third Party Plaintiff, Bernzomatic, is a  
5 Delaware corporation, with its principal place of business in  
6 North Carolina.

7 2. Third Party Defendant, Western Industries, Inc., is a  
8 closely-held corporation with its principal place of business in  
9 Wisconsin.

10 3. Third Party Defendant, Worthington Industries, Inc., is  
11 an Ohio corporation with its principal place of business in Ohio.

12 4. At various times, both Western and Worthington  
13 manufactured and sold Bernzomatic-branded MAPP gas cylinders.

14 5. Worthington purchased Western's cylinder business in  
15 September 2004.

16 JURISDICTION AND VENUE

17 6. Subject matter jurisdiction is proper in this Court  
18 because federal district courts in California recognize the rights  
19 of Third Party Complainant to Declarations of Rights, Breach of  
20 Contract Claims, Contractual Indemnity, Common Law Indemnity and  
21 Punitive Damages. This Court has Personal Jurisdiction over the  
22 Third Party Defendants under the California long-arm statute as  
23 the actions or failures to act by the Third Party Defendants  
24 caused damage to the Defendant/Third Party Plaintiff and gave rise  
25 to claims in California.

26 7. Venue is proper in this Court because all of the  
27 Plaintiffs' litigation claims arose in this jurisdiction, and all  
28 of the Third Party Complaint claims are derivative of those

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1 litigation claims.

2 FACTUAL ALLEGATIONS

3 8. Defendant/Third Party Plaintiff, Bernzomatic, has been  
4 named as a Defendant in the above-captioned lawsuit (the "Shalaby  
5 litigation"). Plaintiffs filed suit on October 10, 2006 and  
6 recently amended their Complaint on June 11, 2007.

7 9. The Joint Case Management Statement and Order entered on  
8 February 20, 2007 alleges that Plaintiff, Andrew Shalaby, suffered  
9 burns to his face and extremities due to an accident involving a  
10 Bernzomatic-branded MAPP gas cylinder that he used to light a  
11 campfire. It further alleges that liquid MAPP gas inside the  
12 pressurized cylinder absorbed energy from the surrounding fire and  
13 heated up such that it vaporized causing the cylinder to produce  
14 "an explosive effect."

15 10. The Joint Case Management Statement and Order entered on  
16 February 20, 2007 states that fire department personnel who  
17 responded during the incident instructed the onsite manager to  
18 discard the product. Depositions of fire department and onsite  
19 personnel were taken on April 17, 2007 confirming that the product  
20 had been discarded.

21 11. Third Party Defendants, Western and Worthington,  
22 manufactured MAPP gas cylinders, such as the one allegedly  
23 involved in this action.

24 12. Defendant/Third Party Plaintiff purchased MAPP gas  
25 cylinders exclusively from Western and Worthington during the time  
26 periods relevant to this action.

27 13. To the extent that a Bernzomatic-branded MAPP gas  
28 cylinder was involved in the accident which forms the basis of

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1 Plaintiffs' Complaint against Bernzomatic and Home Depot, said  
2 MAPP gas cylinder was manufactured by either Western or  
3 Worthington.

4 14. Defendant/Third Party Plaintiff cannot determine whether  
5 Western or Worthington manufactured the MAPP gas cylinder involved  
6 because the fire department personnel who responded during the  
7 incident instructed the onsite manager to discard the product and  
8 it cannot be recovered.

9 15. Upon information and belief, the written contract  
10 between Worthington and Western regarding the sale of the cylinder  
11 business in September 2004 contains an express provision setting  
12 forth a method to facilitate identification of a cylinder's  
13 manufacturer if it cannot be determined by a serial number or  
14 other reliable information.

15 FIRST CLAIM - DECLARATION OF RIGHTS

16 16. Defendant/Third Party Plaintiff incorporates by  
17 reference the allegations in Paragraphs 1 through 15 of this Third  
18 Party Complaint as if fully rewritten herein.

19 17. Exclusive Supply Agreements between Newell Operating  
20 Company (a predecessor to Industrial Tool Company, dba  
21 Bernzomatic) and Western in 2001, as well as between Irwin  
22 Industrial Tool Company, dba Bernzomatic, and Worthington in 2006  
23 for Western's and Worthington's MAPP gas cylinders included  
24 indemnification provisions. In September 2004, Worthington  
25 assumed the rights and obligations of Western under the 2001  
26 Supply Agreement resulting from Worthington's purchase of  
27 Western's cylinder business at that time.

28 18. The indemnification provision at page 10 of the

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1 Agreement between Newell (Bernzomatic) and Western states, in  
2 pertinent part:

3 "Western assumes and agrees to indemnify, defend and  
4 hold harmless Newell and its affiliates, directors,  
5 officers, employees and agents for all claims against  
6 Newell for personal injury or property damage to the  
7 extent such injury or damage is alleged to be caused by  
8 or is caused by the sale or distribution of Covered  
9 Cylinders supplied under this Agreement that were not  
10 suitable for sale, distribution or use due to the  
11 design, manufacture, labeling or failure to label, or  
12 storage prior to delivery to Newell of such Covered  
13 Cylinders. Western further agrees to indemnify, defend  
14 and hold harmless Newell and its affiliates, directors,  
15 officers, employees and agents for all claims against  
16 Newell resulting from the failure to manufacture  
17 products in accordance with applicable laws including  
18 environmental and labor laws."

19 19. The indemnification provision at page 8 of the Agreement  
20 between Irwin Industrial Tool Company (Bernzomatic) and  
21 Worthington states, in pertinent party:

22 "WCW [Worthington] assumes and agrees to indemnify,  
23 defend and hold harmless BernzOmatic and its customers,  
24 affiliates, directors, officers, employees and agents  
25 for all claims against BernzOmatic for personal injury  
26 or property damage to the extent such injury or damage  
27 is alleged to be cause[d] by or is caused by in whole or  
28 in part the sale or distribution of Covered Cylinders

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1 supplied under this Agreement that were not suitable for  
2 sale, distribution or use due to the design,  
3 manufacture, labeling or failure to label (except as  
4 provided in Section 4.4), or storage prior to delivery  
5 to BernzOmatic of such Covered Cylinders. WCW further  
6 agrees to indemnify, defend and hold harmless  
7 BernzOmatic and its affiliates, directors, officers,  
8 employees and agents for all claims against BernzOmatic  
9 resulting from the failure to manufacture products in  
10 accordance with applicable laws.

11 20. The allegations in the Shalaby litigation are for  
12 personal injury caused by the sale or distribution of covered  
13 cylinders - (a Bernzomatic-branded MAPP gas cylinder) -  
14 manufactured and sold by Western and Worthington pursuant to the  
15 Supply Agreements, which contained the above-cited indemnification  
16 provisions.

17 21. Pursuant to the indemnification provisions, Bernzomatic  
18 tendered its defense and indemnification to Western on June 19,  
19 2006, and to Worthington on January 24, 2007.

20 22. To date, Western has neither defended nor indemnified  
21 Bernzomatic, which is a breach of the indemnification provision in  
22 the Supply Agreement.

23 23. To date, Worthington, has neither defended nor  
24 indemnified Bernzomatic, which is a breach of the indemnification  
25 provision in the Supply Agreement.

26 24. An actual dispute exists between Defendant/Third Party  
27 Plaintiff and Plaintiffs, Andrew Shalaby and Sonia Dunn-Ruiz.

28 25. Bernzomatic is entitled to a declaration of rights under

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1 the contracts against Western and Worthington and the obligations  
2 under the indemnification provisions of the Supply Agreement as  
3 follows:

4 a. Western is obligated under the indemnification  
5 provisions of the Supply Agreement and by virtue of its breach of  
6 its duty to defendant Bernzomatic in the Shalaby litigation, to  
7 indemnify Bernzomatic with respect to the full amount of all  
8 defense costs and any liability or settlement in the Shalaby  
9 litigation without any cost sharing, apportionment between  
10 particular claims or allegations, or limitation on amount.

11 b. Worthington is obligated under the indemnification  
12 provisions of the Supply Agreement and by virtue of its breach of  
13 its duty to defendant Bernzomatic in the Shalaby litigation, to  
14 indemnify Bernzomatic with respect to the full amount of all  
15 defense costs and any liability or settlement in the Shalaby  
16 litigation without any cost sharing, apportionment between  
17 particular claims or allegations, or limitation on amount.

18 SECOND CLAIM - BREACH OF CONTRACT/CONTRACTUAL INDEMNIFICATION

19 26. Defendant/Third Party Plaintiff incorporates by  
20 reference the allegations in Paragraphs 1 through 25 of this  
21 Complaint as if fully rewritten herein.

22 27. Western has breached its express and implied obligations  
23 under the Supply Agreement because it has failed to defend and  
24 indemnify Defendant/Third Party Plaintiff and hold it harmless  
25 with respect to any of the amounts Defendant/Third Party Plaintiff  
26 has incurred and will incur in the future because of the Shalaby  
27 litigation.

28 28. Such breach of contract by Western has directly and

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1 proximately caused injury to Defendant/Third Party Plaintiff,  
2 including, but not limited to, the payment of the entire cost of  
3 the Shalaby litigation and the payment of fees and expenses in  
4 defending the Shalaby litigation.

5 29. Worthington has breached its express and implied  
6 obligations under the Supply Agreement because it has failed to  
7 defend and indemnify Defendant/Third Party Plaintiff and hold it  
8 harmless with respect to any of the amounts Defendant/Third Party  
9 Plaintiff has incurred and will incur in the future because of the  
10 Shalaby litigation.

11 30. Such breach of contract by Worthington has directly and  
12 proximately caused injury to Defendant/Third Party Plaintiff,  
13 including, but not limited to, the payment of the entire cost of  
14 the Shalaby litigation and the payment of fees and expenses in  
15 defending the Shalaby litigation.

16 THIRD CLAIM - EQUITABLE INDEMNIFICATION

17 31. Defendant/Third Party Plaintiff incorporates by  
18 reference the allegations in Paragraphs 1 through 30 of this  
19 Complaint as if fully rewritten herein.

20 32. Third Party Defendants, Western and Worthington,  
21 manufactured Bernzomatic-branded MAPP gas cylinders and introduced  
22 those cylinders into the stream of commerce by selling them to  
23 Defendant/Third Party Plaintiff.

24 33. To the extent that the MAPP gas cylinder at issue is  
25 held to be defective, which Defendant/Third Party Plaintiff  
26 expressly denies, one of the Third Party Defendants, Western  
27 and/or Worthington, introduced that defect by manufacturing and  
28 selling MAPP gas cylinders to Defendant/Third Party Plaintiff for

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1 further distribution and resale to the Plaintiffs.

2 34. To the extent that the MAPP gas cylinder at issue is  
3 held to have caused injuries and damages to Andrew Shalaby and  
4 Sonia Dunn-Ruiz, which Defendant/Third Party Plaintiff expressly  
5 denies, Third Party Defendants, Western and Worthington, are  
6 liable for those injuries as a result of the manufacture and sale  
7 of those MAPP gas cylinders to Defendant/Third Party Plaintiff for  
8 further distribution and resale.

9 35. Because the cylinder product was discarded well before  
10 any lawsuit or involvement of the Defendant/Third Party Plaintiff,  
11 there is no way to discover whether Western or Worthington  
12 manufactured the cylinder at issue.

13 36. Because it is certain that the manufacturer of the  
14 cylinder at issue was either Western or Worthington, both Western  
15 and Worthington owe indemnity to the Defendant/Third Party  
16 Plaintiff for any alleged harm caused by the cylinder.

17 37. Thus, as a result of their actions, Third Party  
18 Defendants, Western and Worthington, owe a complete common law  
19 duty of indemnification to Defendant/Third Party Plaintiff for all  
20 damages, costs, expenses and fees associated with the Shalaby  
21 litigation.

22 FOURTH CLAIM - THIRD PARTY BENEFICIARY

23 38. Defendant/Third Party Plaintiff incorporates by  
24 reference the allegations in Paragraphs 1 through 37 of this  
25 Complaint as if fully rewritten herein.

26 39. Defendant/Third Party Plaintiff is an intended third  
27 party beneficiary of the contract between Western and Worthington  
28 for the sale of the cylinder business in September 2004, wherein

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1 an express method was provided for determining which manufacturer  
2 is responsible for a cylinder when it cannot be determined by  
3 serial number or other reliable information.

4 40. As set forth in the First Claim, both Third Party  
5 Defendants, Western and Worthington, separately contracted with  
6 Defendant/Third Party Plaintiff, Bernzomatic, to defend and  
7 indemnify Bernzomatic against claims involving cylinders  
8 manufactured by each of them.

9 41. One purpose of the contractual provision to identify a  
10 cylinder manufacturer in the absence of a serial number or other  
11 reliable information is to insure that at least one of the  
12 manufacturers will take responsibility for the manufacture of the  
13 cylinder.

14 42. The identification of the cylinder manufacturer may be  
15 necessary to enforce Defendant/Third Party Plaintiff Bernzomatic's  
16 rights to a defense and indemnification as set forth in the First,  
17 Second and Third Claims.

18 FIFTH CLAIM - ESTOPPEL

19 43. Defendant/Third Party Plaintiff incorporates by  
20 reference the allegations in Paragraph 1 through 42 as if fully  
21 rewritten herein.

22 44. Given the allegations in the Shalaby litigation that a  
23 Bernzomatic-branded MAPP gas cylinder caused Plaintiff's injuries,  
24 it is undisputed that either Western or Worthington manufactured  
25 the MAPP gas cylinder.

26 45. If Plaintiffs are able to maintain an action against  
27 Defendant/Third Party Plaintiff Bernzomatic for injuries, Western  
28 and Worthington are estopped from denying responsibility for the

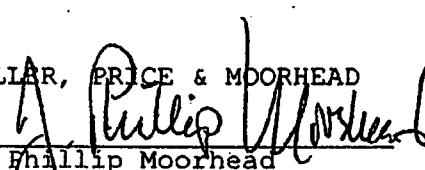
Case 3:06-cv-07026-EDL Document 38 Filed 06/19/2007 Page 11 of 12

1 manufacture, sale and distribution of the Bernzomatic-branded MAPP  
2 gas cylinder as it would lead to an unjust result.

3 WHEREFORE, Defendant/Third Party Plaintiff demands judgment  
4 in its favor and against both Western and Worthington on all  
5 counts for the full amount of all defense costs and any liability  
6 or settlement in the Shalaby litigation, together with attorneys'  
7 fees, costs, expenses and any other relief the Court deems  
8 equitable and just.

9 DATED: June 19, 2007

KELLER, PRICE & MOORHEAD

10   
11 J. Phillip Moorhead  
12 Attorneys for Defendant/Third  
13 Party Plaintiff, BERNZOMATIC, an  
14 Unincorporated Division of Irwin  
15 Industrial Tool Company, and  
16 Defendant, THE HOME DEPOT, INC.

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Case 3:06-cv-07026-EDL Document 38 Filed 06/19/2007 Page 12 of 12

1 UNITED STATES DISTRICT COURT  
 2 NORTHERN DISTRICT OF CALIFORNIA  
 2 Andrew Shalaby v. Bernzomatic/Home Depot, Inc.  
 3 CASE NO. C 06 7026 CW

4 PROOF OF SERVICE

5 I am employed in the county of Los Angeles, State of  
 6 California. I am over the age of 18 and not a party to the within  
 action; my business address is 229 Avenue "I", Second Floor,  
 Redondo Beach, California 90277.

7 On June 19, 2007, I served the foregoing document described as  
 8 **THIRD PARTY COMPLAINT** on all interested parties in this action as  
 set forth below:

9  
 10 Mark D. Epstein  
 11 Alborg, Veiluva & Epstein LLP  
 12 200 Pringle Avenue, Suite 410  
 13 Walnut Creek, CA 94596  
 14 (925) 939-9880 FAX (925) 939-9915  
 15 (Attorneys for Plaintiffs, Andrew Shalaby and Sonia Dunn-Ruiz)

16  
 17 FAXSIMILE - by use of facsimile machine telephone number  
 18 (310) 540-8480, I served a copy of the within document, to the by  
 19 facsimile numbers set forth above. The facsimile machine I used  
 20 complied with California Rules of Court, Rule 2004, and no error  
 21 was reported by the machine. Pursuant to California Rules of  
 22 Court, Rule 2006(d), I caused the machine to print a transmission  
 23 record of the transmission, a copy of which is attached to this  
 Declaration.

24  
 25 MAIL - I caused such envelope with postage thereon fully  
 26 prepaid to be placed in the United States mail at Redondo Beach,  
 27 California. I am "readily familiar" with the firm's practice of  
 28 collection and processing correspondence for mailing. Under that  
 practice it would be deposited with the U.S. Postal Service that  
 same day with postage thereon fully prepaid at Redondo Beach,  
 California, in the ordinary course of business. I am aware that on  
 motion of the party served, service is presumed invalid if postal  
 cancellation date or postage meter date is more than one day after  
 date of deposit for mailing in affidavit.

26  
 27 FEDERAL - I declare under penalty of perjury that the  
 28 foregoing is true and correct, and that I am employed in the office  
 of a member of the Bar of this Court at whose direction the service  
 was made.

26 Executed on June 19, 2007, at Redondo Beach, California.

27  
 28   
 Deidre A. Picascia

1 J. Phillip Moorhead, Esq. (SBN 99445)  
2 KELLER, PRICE & MOORHEAD  
2 229 Avenue I, Second Floor  
Redondo Beach, California 90277-5600  
3 Telephone: (310) 540-1332

4  
5 Attorneys for Defendants, IRWIN INDUSTRIAL TOOL COMPANY, INC. and  
HOME DEPOT, INC.

6

7

8 UNITED STATES DISTRICT COURT  
9 NORTHERN DISTRICT OF CALIFORNIA

10

11 ANDREW SHALABY, an individual, ) CASE NO. C 06 7026 EDL  
12 and SONIA DUNN-RUIZ, an ) Magistrate Judge Elizabeth D.  
13 individual, ) LaPorte  
14 Plaintiffs, ) STIPULATION AND ORDER  
15 v. )  
16 IRWIN INDUSTRIAL TOOL COMPANY, )  
INC., THE HOME DEPOT, INC., )  
17 and DOES 2 through 100, )  
inclusive, )  
18 Defendants. )  
19  
20  
21  
22

23 IT IS HEREBY STIPULATED and agreed, by and between counsel  
24 for Plaintiffs (Andrew Shalaby and Sonia Dunn-Ruiz), counsel for  
25 Defendants and Third Party Plaintiff (The Home Depot, Inc. and  
26 Bernzomatic), and counsel for Third Party Defendant (Western  
27 Industries, Inc.), as follows:

28 / / /

1       1. WHEREAS, Western Industries, Inc. made an initial  
2 appearance in this case on July 16, 2007 by filing a motion to  
3 strike Bernzomatic's third party complaint; and

4

5       2. WHEREAS, Worthington Cylinder Corporation has been named  
6 and served with the third party complaint, but does not anticipate  
7 making a formal appearance in the action until on or about  
8 July 31, 2007; and

9

10       3. WHEREAS, the Court has previously ordered the parties to  
11 complete mediation on or before July 25, 2007; and

12

13       4. WHEREAS, counsel for all present and anticipated parties  
14 to this litigation concur that a meaningful mediation cannot be  
15 completed until both third party defendants have appeared in the  
16 action and completed sufficient investigation and discovery to  
17 effectively discuss the disposition of this case through  
18 mediation;

19

20       IT IS HEREBY STIPULATED AND AGREED, by and between the  
21 existing parties to this litigation, that the mediation completion  
22 date should be postponed and continued to a date suitable to the  
23 Court's calendar on or about October 26, 2007, that all parties  
24 respectfully request the Court to enter an order in conformance  
25 with this Stipulation, and that all parties respectfully request  
26 that the Court schedule a case management conference at the  
27 Court's convenience within the next 45 days where the parties can  
28 advise the Court of the status of the case and discuss the

1 rescheduling of discovery cut-offs, motion cut-offs, trial dates,  
2 etc.

3 DATED: July 17, 2007

ALBORG, VEILUVA & EPSTEIN LLP

*Mark Epstein*

Mark D. Epstein  
Attorneys for Plaintiffs  
ANDREW SHALABY and SONIA DUNN-RUIZ

7 DATED: July , 2007

MCCORMICK, BARSTOW SHEPPARD, ET AL.

8 Lowell Carruth  
9 Attorneys for Third Party Defendant  
10 WESTERN INDUSTRIES, INC.

11 DATED: July , 2007

KELLER, PRICE & MOORHEAD

12 J. Phillip Moorhead  
13 Attorneys for Defendants and Third  
14 Party Plaintiff  
15 HOME DEPOT, INC. and BERNZOMATIC

16 ORDER

17 GOOD CAUSE APPEARING THEREFOR, it is hereby ordered that the  
18 mediation completion date in this case is postponed and continued  
19 to October 26, 2007, and that the Court will notify all parties of  
20 a case management conference within the next 45 days.

21  
22 DATED:

23 Elizabeth D. LaPorte  
24 Magistrate Judge

25

26

27

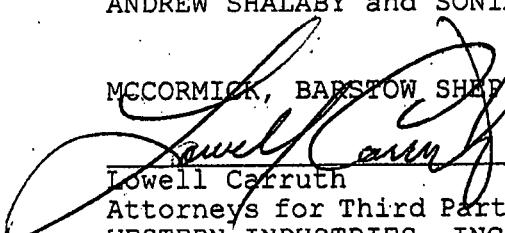
28

1 rescheduling of discovery cut-offs, motion cut-offs, trial dates,  
2 etc.

3 DATED: July , 2007 ALBORG, VEILUVA & EPSTEIN LLP

4  
5 Mark D. Epstein  
6 Attorneys for Plaintiffs  
7 ANDREW SHALABY and SONIA DUNN-RUIZ

8 DATED: July 18, 2007 MCCORMICK, BARSTOW SHEPPARD, ET AL.

9   
10 Lowell Caftruh  
11 Attorneys for Third Party Defendant  
12 WESTERN INDUSTRIES, INC.

13 DATED: July , 2007 KELLER, PRICE & MOORHEAD

14  
15 J. Phillip Moorhead  
16 Attorneys for Defendants and Third  
17 Party Plaintiff  
18 HOME DEPOT, INC. and BERNZOMATIC

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Elizabeth D. LaPorte  
Magistrate Judge

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3 DATED: July , 2007 ALBORG, VEILUVA & EPSTEIN LLP

4  
5 Mark D. Epstein  
6 Attorneys for Plaintiffs  
7 ANDREW SHALABY and SONIA DUNN-RUIZ

8 DATED: July , 2007 MCCORMICK, BARSTOW SHEPPARD, ET AL.

9 Lowell Carruth  
10 Attorneys for Third Party Defendant  
11 WESTERN INDUSTRIES, INC.

12 DATED: July 17 , 2007

13 KELLER, PRICE & MCORHEAD  
14   
15 J. Phillip Moonhead  
16 Attorneys for Defendants and Third  
17 Party Plaintiff  
18 HOME DEPOT, INC. and BERNZOMATIC

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33 DATED:

34  
35 Elizabeth D. LaPorte  
36 Magistrate Judge

1 J. Phillip Moorhead, Esq. (SBN 99445)  
2 KELLER, PRICE & MOORHEAD  
3 229 Avenue I, Second Floor  
Redondo Beach, California 90277-5600  
3 Telephone: (310) 540-1332

4  
5 Attorneys for Defendants, IRWIN INDUSTRIAL TOOL COMPANY, INC. and  
HOME DEPOT, INC.

6

7

8 UNITED STATES DISTRICT COURT  
9 NORTHERN DISTRICT OF CALIFORNIA

10

11 ANDREW SHALABY, an individual, ) CASE NO. C 06 7026 EDL  
12 and SONIA DUNN-RUIZ, an ) Magistrate Judge Elizabeth D.  
13 individual, ) LaPorte  
14 Plaintiffs, ) STIPULATION AND ORDER  
15 v. )  
16 IRWIN INDUSTRIAL TOOL COMPANY, )  
INC., THE HOME DEPOT, INC., )  
17 and DOES 2 through 100, )  
inclusive, )  
18 Defendants. )  
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23 IT IS HEREBY STIPULATED and agreed, by and between counsel  
24 for Plaintiffs (Andrew Shalaby and Sonia Dunn-Ruiz), counsel for  
25 Defendants and Third Party Plaintiff (The Home Depot, Inc. and  
26 Bernzomatic), and counsel for Third Party Defendant (Western  
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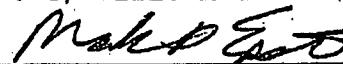
19

20       IT IS HEREBY STIPULATED AND AGREED, by and between the  
21 existing parties to this litigation, that the mediation completion  
22 date should be postponed and continued to a date suitable to the  
23 Court's calendar on or about October 26, 2007, that all parties  
24 respectfully request the Court to enter an order in conformance  
25 with this Stipulation, and that all parties respectfully request  
26 that the Court schedule a case management conference at the  
27 Court's convenience within the next 45 days where the parties can  
28 advise the Court of the status of the case and discuss the

1 rescheduling of discovery cut-offs, motion cut-offs, trial dates,  
2 etc.

3 DATED: July 17, 2007

ALBORG, VEILUVA & EPSTEIN LLP



4  
5 Mark D. Epstein  
6 Attorneys for Plaintiffs  
7 ANDREW SHALABY and SONIA DUNN-RUIZ

8 DATED: July , 2007

9 MCCORMICK, BARSTOW SHEPPARD, ET AL.

10  
11 Lowell Carruth  
12 Attorneys for Third Party Defendant  
13 WESTERN INDUSTRIES, INC.

14 DATED: July , 2007

15 KELLER, PRICE & MOORHEAD

16  
17 J. Phillip Moorhead  
18 Attorneys for Defendants and Third  
19 Party Plaintiff  
20 HOME DEPOT, INC. and BERNZOMATIC

21  
22 ORDER

23 GOOD CAUSE APPEARING THEREFOR, it is hereby ordered that the  
24 mediation completion date in this case is postponed and continued  
25 to October 26, 2007, and that the Court will notify all parties of  
26 a case management conference within the next 45 days.

27 DATED:

28  
Elizabeth D. LaPorte  
Magistrate Judge

1 rescheduling of discovery cut-offs, motion cut-offs, trial dates,  
2 etc.

3 DATED: July , 2007 ALBORG, VEILUVA & EPSTEIN LLP

5  
Mark D. Epstein  
Attorneys for Plaintiffs  
ANDREW SHALABY and SONIA DUNN-RUIZ

7 DATED: July 18, 2007 MCCORMICK, BARSTOW SHEPPARD, ET AL.

Lowell Carruth  
Attorneys for Third Party Defendant  
WESTERN INDUSTRIES, INC.

11 DATED: July , 2007 KELLER, PRICE & MOORHEAD

12 J. Phillip Moorhead  
13 Attorneys for Defendants and Third  
14 Party Plaintiff  
HOME DEPOT, INC. and BERNZOMATIC

ORDER

17        GOOD CAUSE APPEARING THEREFOR, it is hereby ordered that the  
18 mediation completion date in this case is postponed and continued  
19 to October 26, 2007, and that the Court will notify all parties of  
20 a case management conference within the next 45 days.

22 | DATED:

Elizabeth D. LaPorte  
Magistrate Judge

1 rescheduling of discovery cut-offs, motion cut-offs, trial dates,  
2 etc.

3 DATED: July , 2007 ALBORG, VEILUVA & EPSTEIN LLP

4  
5 Mark D. Epstein  
6 Attorneys for Plaintiffs  
7 ANDREW SHALABY and SONIA DUNN-RUIZ

8 DATED: July , 2007 MCCORMICK, BARSTOW SHEPPARD, ET AL.

9 Lowell Carruth  
10 Attorneys for Third Party Defendant  
11 WESTERN INDUSTRIES, INC.

12 DATED: July 17 , 2007

13 KELLER, PRICE & MOORHEAD

14 J. Phillip Moorhead  
15 Attorneys for Defendants and Third  
16 Party Plaintiff  
17 HOME DEPOT, INC. and BERNZOMATIC

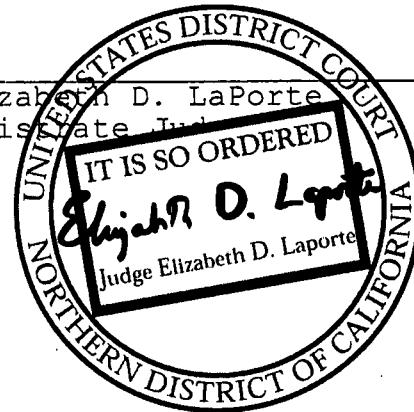
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ORDER

29 GOOD CAUSE APPEARING THEREFOR, it is hereby ordered that the  
30 mediation completion date in this case is postponed and continued  
31 to October 26, 2007, and that the Court will notify all parties of  
32 on September 11, 2007 at 3:00 p.m. An updated joint case management conference statement shall  
33 be filed no later than September 4, 2007.

34 DATED: July 23, 2007

35 Elizabeth D. LaPorte  
36 Magistrate Judge

37 IT IS SO ORDERED  
38 *Elizabeth D. LaPorte*  
39 Judge Elizabeth D. LaPorte



1 Lowell T. Carruth, # 034065  
2 McCormick, Barstow, Sheppard,  
Wayte & Carruth LLP  
3 P.O. Box 28912  
4 5 River Park Place East  
Fresno, CA 93720-1501  
Telephone: (559) 433-1300  
Facsimile: (559) 433-2300

(SPACE BELOW FOR FILING STAMP ONLY)

5  
6 Attorneys for Third-Party Defendant  
WESTERN INDUSTRIES, INC.

7  
8 UNITED STATES DISTRICT COURT  
9 NORTHERN DISTRICT OF CALIFORNIA

10  
11 ANDREW SHALABY, an individual, and  
SONIA DUNN-RUIZ, an individual,

12 Plaintiffs,

13 v.

14 IRWIN INDUSTRIAL TOOL  
15 COMPANY, THE HOME DEPOT, INC.,  
and DOES 2 through 100, inclusive,

16 Defendants.

17 BERNZOMATIC,

18 Cross-Complainant,

19 v.

20 WESTERN INDUSTRIES, INC.,  
WORTHINGTON INDUSTRIES, AND  
ROES 2 through 100, inclusive,

21 Cross-Defendants.

Case No. C 06-07026 EDL

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**DECLINATION TO PROCEED BEFORE A  
MAGISTRATE JUDGE AND REQUEST  
FOR REASSIGNMENT TO A UNITED  
STATES DISTRICT JUDGE**

Judge: Elizabeth D. LaPorte

The undersigned party hereby declines to consent to the assignment of this case to a United States Magistrate Judge for trial and disposition and hereby requests the reassignment of this case to a United States District Judge.

///

1 Dated: August 9, 2007

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McCORMICK, BARSTOW, SHEPPARD,  
WAYTE & CARRUTH LLP

By: /s/ Lowell T. Carruth

Lowell T. Carruth

Attorneys for Third-Party Defendant  
WESTERN INDUSTRIES, INC.

03664/00161-1126652.v1

1  
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3  
4 ANDREW SHALABY, et al.,  
5  
6

7 Plaintiffs,  
8

No. C-06-07026 EDL

9 v.  
10

11 NOTICE OF IMPENDING  
12 REASSIGNMENT TO A UNITED  
13 STATES DISTRICT COURT JUDGE

14 NEWELL RUBBERMAID, INC., et al.,  
15

16 Defendants.  
17

18 The Clerk of this Court will now randomly reassign this case to a United States District Judge  
19 because either:

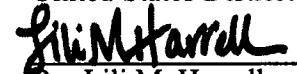
20 XX (1) One or more of the parties has requested reassignment to a United States District Judge  
21 or has not consented to the jurisdiction of a United States Magistrate Judge, or

22 (2) One or more of the parties has sought a type of judicial action (e.g., a temporary  
23 restraining order) that a United States Magistrate Judge may not take without the consent of all parties,  
24 the necessary consents have not been secured, and time is of the essence.

25 The motion hearing and the further case management conference set for September 11, 2007 on  
26 Magistrate Judge Laporte's calendar will NOT be held.

27  
28 Dated: August 10, 2007

Richard W. Wiking, Clerk  
United States District Court

  
25  
26 By: Lili M. Harrell  
27 Deputy Clerk  
28

UNITED STATES DISTRICT COURT  
Northern District of California  
450 Golden Gate Avenue  
San Francisco, California 94102

[www.cand.uscourts.gov](http://www.cand.uscourts.gov)

Richard W. Wiering  
Clerk

General Court Number  
415.522.2000

August 13, 2007

**CASE NUMBER: CV 06-07026 EDL**

**CASE TITLE: SHALABY ET AL-v-NEWELL RUBBERMAID, INC. ET AL**

**REASSIGNMENT ORDER**

GOOD CAUSE APPEARING THEREFOR,

IT IS ORDERED that this case is reassigned to the **San Francisco** division.

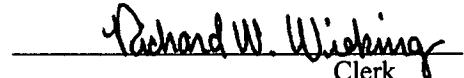
**Honorable MARTIN J. JENKINS** for all further proceedings.

Counsel are instructed that all future filings shall bear the initials **MJJ** immediately after the case number.

ALL MATTERS PRESENTLY SCHEDULED FOR HEARING ARE VACATED AND SHOULD BE RENOTICED FOR HEARING BEFORE THE JUDGE TO WHOM THE CASE HAS BEEN REASSIGNED.

Date: 8/13/07

FOR THE EXECUTIVE COMMITTEE:

  
\_\_\_\_\_  
Clerk

**NEW CASE FILE CLERK:**

Copies to: Courtroom Deputies  
Log Book Noted

Special Projects  
Entered in Computer 8/13/07AS

**CASE SYSTEMS ADMINISTRATOR:**  
Copies to: All Counsel

Transferor CSA